Bell Transit Company *and* Teamsters Local Union No. 175, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 9–CA–18919–1

29 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 6 July 1983 Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel filed exceptions, a supporting brief, and an answering brief. The Respondent filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The facts are set out more fully in the judge's decision. The Respondent, Bell Transit Company (Bell), is a labor broker. Bell hires, supervises, and compensates the truckdrivers at several facilities operated by Union Carbide. In return, Union Carbide pays Bell a management fee and reimburses Bell for the drivers' direct labor costs. The Charging Party, Teamsters Local 175 (the Union), represents the 19 Bell drivers at Union Carbide's Institute, West Virginia facility. Bell was a party to the Teamsters' National Master Freight Agreement that expired on 31 March 1982.

During 1981 Union Carbide warned Bell that it had received offers[1] from other labor brokers to staff Union Carbide facilities with less expensive drivers. Bell responded by seeking to negotiate a new collective-bargaining agreement with lower wage rates. Bell continued to abide by the provisions of the existing National Master Freight Agreement until it expired[2] on 31 March 1982. On 28 September 1981, however, Bell timely revoked the authority of Trucking Management, Inc. to represent it in the upcoming negotiations for a new National Master Freight Agreement. Then, on 25 January 1982 Bell requested local contract bargaining[3] with the Union for the Institute unit. Bell and the Union held a preliminary bargaining meeting on 5 March 1982. A contract proposal drafted by one of Bell's managers was unacceptable to Bell's president, Max Rein, so Bell did not offer a proposal at that meeting. Contrary to the judge, we find[4] that Rein informed the Union on 5 March that Bell wanted to reduce its drivers' wage rates in order to retain Union Carbide's business. The parties met again[5] on 5, 6, and 7 April 1982. Bell presented its contract proposal on 5 April. During the course of bargaining, the union representatives told Bell that, while they were authorized to negotiate, only the Teamsters Eastern Conference had authority to approve any contract proposal. On 7 April, Bell proposed a wage rate of $9.71 per hour with a reopener in the second and third years of the contract. The Union responded with a counterproposal of $13.15 per hour.[6] The parties scheduled another meeting for 4 May 1982. At that session Bell offered two revised wage proposals. Bell offered either a wage rate of $10 per hour with an annual reopener, or a wage rate of $11 per hour with no reopener. The Union stuck with its prior $13.15 per hour proposal. On 7 May 1982, immediately prior to a union membership meeting, Bell offered another revised wage proposal. This offer provided for an $11.25 per hour wage rate with a reopener in the third year. At the meeting, the union leaders explained Bell's most recent proposals to the union members. The leaders took a straw poll in order to assess the proposals' support. The poll showed an even split among the members, so the leadership decided to submit the proposals, including the 7 May wage proposal, to the Eastern Conference.[7] A few days after the union meeting, union officer Dan Forwood telephoned Max Rein. Forwood told Rein of the split in the membership over Bell's proposals. The conversation then proceeded substantially as follows:

> Rein: Well, what does that mean?
>
> Forwood: Well, they didn't reject your contract; we'd need a two-thirds vote for that.

[1] Bell's president, Max Rein, testified that Union Carbide actually replaced Bell with a less costly labor broker at one of its facilities.

[2] On 26 March 1982 Bell and the Union adopted an interim agreement providing for a continuation of the expiring contract's $12.68 hourly wage rate pending execution of the new local agreement.

[3] Bell's letter requesting local bargaining noted that "competitive conditions require this action."

[4] We base this finding on undisputed testimony by union official Daniel Forwood.

[5] We correct the judge's inadvertent finding that these meetings took place on 4, 5, and 6 April 1982.

[6] This counterproposal corresponded to the rate payable as of 1 April 1982 under the Teamsters' National Master Freight Agreement. As noted above, the parties operated from 1 April 1982 under an interim local agreement providing for a $12.68 wage rate.

[7] After some delay, the Union sent Bell's proposals, with an internal memo recommending rejection, to the Eastern Conference on 11 June 1982. This memo noted that Bell's proposals "do not meet the hourly and mileage rates as was negotiated in the new National Master Freight Agreement." The Eastern Conference eventually rejected the proposals by letter dated 10 August 1982.

Rein: Well, then we've got a contract.

Forwood: You know I have to have that approved by the Eastern Conference.

Rein: Well, as long as the men didn't reject it, we have a good chance.

On 14 May 1982 Rein telephoned Forwood and notified him that Bell intended to implement its most recent contract proposals, including the $11.25 wage rate, as of 16 May 1982. Forwood responded by saying, "Well, go ahead and see what happens. You take your best hold and we'll get ours later." Bell implemented the proposals on 16 May 1982. The Union filed a charge alleging that Bell violated Section 8(a)(5) and (1) by reducing its drivers' wages from $12.68 per hour to $11.25 per hour on 16 May. In his attached decision, the judge concluded that, absent any agreement, acquiescence, or impasse, Bell's 16 May wage reduction constituted a unilateral change in violation of Section 8(a)(5). We disagree and dismiss the complaint. In our view, the parties were at impasse on 16 May as to the wage rate proposal. Accordingly, Bell's wage reduction did not violate Section 8(a)(5).

It is well settled that:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Taft Broadcasting Co., 163 NLRB 475, 478 (1967), petition for review denied 395 F.2d 622 (D.C. Cir. 1968). In our judgment, the *Taft* factors herein clearly support a finding of impasse on 16 May 1982 on the wage rate issue. The parties' extensive bargaining history lends support to a finding of impasse. Bell and the Union have developed a good bargaining relationship over their 26 years[8] of contract administration and grievance processing. Moreover, it is undisputed that the parties' instant negotiations were conducted in good faith. Finally, Bell faced compelling pressure from its only customer, Union Carbide, to cut the drivers' wages or face replacement by other labor brokers. As noted above, Union Carbide heightened this pressure by canceling Bell's contract at another location in favor of a less costly labor broker. Bell repeatedly cautioned the Union about its precarious position. The overriding importance of the wage issue to Bell's continued corporate existence lends very strong support to an impasse finding. Accordingly, based on the parties' extended amicable relationship and on the supreme importance of the wage issue, we find[9] that the parties had bargained to impasse on wages before Bell unilaterally changed them. The Union was afforded the bargaining opportunity[10] to which it is entitled under the Act.[11] We therefore conclude[12] that Bell's wage reduction did not violate Section 8(a)(5) and (1).

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, dissenting.

My colleagues find that the parties had reached impasse on wages in this case even though at the time of the alleged impasse Respondent President Rein believed there was a good chance that an agreement would be forthcoming. I cannot agree that in these circumstances there was an impasse.

The meaning of impasse has long been defined as a stalemate that occurs "after good-faith negotiations have exhausted the prospects of concluding an agreement."[1] No interpretation of the facts in this case can support a finding that the prospects of concluding an agreement were exhausted at the time the Respondent implemented its wage reduction. Only three bargaining exchanges had occurred at which wage proposals and counterproposals were made. At two sessions, the Union stuck with its counterproposal of $13.15 per hour. At the third session, the Respondent offered another wage proposal of $11.25 per hour with a reopener in the

[8] Bell and the Union have maintained a contractual relationship since 1956.

[9] Rein testified that he felt he had an agreement subject to Eastern Conference approval at the time he reduced the drivers' wages. The judge concluded that Rein's contemporaneous understanding of tentative agreement precluded any finding of impasse. We disagree. An understanding of final agreement would preclude an impasse finding. An understanding of tentative agreement may, however, be consistent with an impasse finding. An impasse may exist simultaneously with a tentative agreement. This situation frequently occurs when a union's negotiators accept the employer's final offer subject to ratification by the union's members. If the tentative agreement is accepted, then the impasse breaks. If the tentative agreement is rejected, then the impasse endures. We conclude that the parties herein were at impasse at the same time that Rein felt he had an agreement subject to Eastern Conference approval.

[10] The parties bargained over the wage issue on 7 April and 4 and 7 May 1982. In some cases we would hesitate to find an impasse after only three bargaining exchanges. The Board does not apply a rigid formula, however, to determine how many bargaining sessions are required before an impasse might exist. Under these circumstances, where the wage issue assumed critical importance, we find that the abbreviated extent of the negotiations is entirely consistent with an impasse finding. The parties need not bargain interminably over issues before an impasse is evident.

[11] See generally *E. I. du Pont & Co.*, 268 NLRB 1075 (1984).

[12] We reach this conclusion irrespective of whether there was some movement in Bell's position after it implemented the change, or whether the parties ultimately agreed to a contract, since neither of these facts would show intrinsically that no prior impasse existed.

[1] *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

third year. Immediately after this proposal was made, the Union explained the proposal in a membership meeting. After a poll, there was an even split among the members as to whether to accept the proposal. The leadership decided to submit the proposal to the Eastern Conference which had to approve any final agreement. Union officer Forwood informed President Rein about the split vote and explained that the union members did not reject the proposal. (A two-thirds vote was required for rejection.) When Rein said, "Well, then we've got a contract," Forwood answered that he had to get approval by the Eastern Conference. Rein responded, "Well, as long as the men didn't reject it, we have a good chance." As the judge pointed out, nothing happened between this conversation and 16 May when the Respondent implemented the wage reduction.

It is clear that the Respondent implemented the wage reduction at a time when it knew that half the union members had approved its last proposal and when it thought there was a good chance that the Eastern Conference would approve a final agreement. As the situation stood on the day the Respondent implemented the wage reduction, there was no basis for concluding that negotiations had exhausted the prospects of reaching an agreement. Indeed, at that time it appeared as if negotiations had very nearly produced an agreement. There simply was no impasse on 16 May.

Although my colleagues refer to the extended amicable relationship of the parties and the extreme importance of the wage issue as support for their finding of impasse, they are forced to rely on *subsequent events* to make this finding. As the judge noted, the position of the Eastern Conference on wage levels was firmer than the Respondent thought and ultimately no agreement (based on the Respondent's wage proposal) was possible. My colleagues hint at this position when they state that an understanding of tentative agreement may be consistent with an impasse finding, for example, impasse is broken if a tentative agreement is accepted by union members, whereas an impasse endures if that tentative agreement is rejected.

This argument makes no sense. Section 8(a)(5) of the Act imposes a duty upon employers to bargain in good faith. The Supreme Court has stated that collective bargaining "is not simply an occasion for purely formal meetings between management and labor . . . it presupposes a desire to reach ultimate agreement, to enter into a collective-bargaining contract." *NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960). Questions of impasse must be viewed in light of the central obligations imposed by the Act. In the midst of negotiations, neither party can know the future. Therefore neither the good-faith character of their negotiations nor the determination that those negotiations have stalled can rest upon unknown future events. Whether agreement ultimately proves to be impossible is irrelevant. The central and only determining factors must be the stance of negotiations *at the time* unilateral action is taken. Here, there was every reason to think negotiations would reach fruition and no reason to assume they had exhausted prospects of reaching agreement. For these reasons I, like the judge, would find that the Respondent violated Section 8(a)(5) by implementing the wage reduction.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. The sole business of Respondent Bell Transit Company is providing truckdrivers for several of Union Carbide and Carbon Corporation's facilities. (Bell hires the drivers, directs them, and pays them. Union Carbide pays Bell an amount equal to Bell's labor costs plus a management fee.) This case involves the Bell drivers who work out of Union Carbide's facility in Institute, West Virginia. There are 19 such drivers. They are represented by Teamsters Local Union No. 175 (hereafter Local 175 or the Union). On May 16, 1982, Bell reduced the wage rate it pays the Institute, West Virginia drivers from $12.68 an hour to $11.25. The question is whether, in doing so, Bell violated Section 8(a)(5) of the National Labor Relations Act (the Act).[1]

Bell's wage reduction was not unlawful if it was undertaken pursuant to agreement with Local 175; or if Local 175 acquiesced in the wage change; or if Bell acted at a time when the parties were at an impasse. But my conclusion is that there was neither agreement between the parties, nor acquiescence by the Union, nor impasse, and that Bell accordingly violated Section 8(a)(5) of the Act when it reduced employees' wages.

An Overview of the Negotiations

From 1956 through March 1982 Bell, through an employer association, was a party to the various National Master Freight Agreements in effect during that period. But Bell withdrew from the employer association in order, in the words of a Bell letter to the Teamsters, to be able "to negotiate [an] individual contract responsive to the needs of our operation." Collective bargaining between Bell and Local 175 ensued. Bell President Max Rein invariably represented Bell in the bargaining sessions. The lead negotiators for Local 175 were its business agents. However, Local 175's representatives advised Rein, and Rein understood, that while Local 175's

[1] Local 175 filed a charge on November 8, 1982 alleging that the wage reduction violated the Act. A complaint dated December 16, 1982 followed. Bell admitted the complaint's jurisdictional allegations but denied any wrongdoing. The case went to hearing in Charleston, West Virginia, on April 5 and 6, 1983. Briefs have been filed by the General Counsel, by Bell, and by Local 175.

officials were authorized to negotiate, they had no authority to accept any contract proposal. Only the Teamsters' Eastern Conference could do that.

Rein and Local 175 representatives met in an abortive negotiating session on March 5. (Except where otherwise specified, all events mentioned in this decision occurred in 1982.) Wages were not mentioned. The next session took place on April 4 through 6. The subject of the 3-day session was a proposed contract that Bell had drafted. The wage rate proposed in the contract was $9.71 per hour, down from the $12.68 Bell employees were then being paid.[2] Rein explained that Bell's sole customer, Union Carbide, was insisting on lower wage rates on the ground that competitors of Bell were offering Union Carbide the same services then being provided by Bell at contract prices reflecting wages even lower than Bell's proposed $9.71. The Union's negotiators responded that Bell should increase wages to, at a minimum, $13.15 an hour.

The April session was followed by one on May 4. Bell raised its wage proposal to $11 per hour. Again the Union representatives urged a raise in wages to $13.15.

On May 7 Rein raised the Company's wage offer to $11.25 per hour. After a straw poll of Bell's employees showed that they were evenly split over whether to accept that proposal, the Union determined that Bell's proposed contract should be considered by the Eastern Conference. Local 175 did send the proposed contract to the Eastern Conference, but not until June 11, and accompanied it with a letter urging rejection. The Eastern Conference rejected Bell's contract proposal, and notified Local 175 and Bell of that decision by letter dated August 10.

In the meantime on May 14 Bell notified Local 175 that on May 16 it was going to implement new terms of employment reflecting Bell's contract proposal of May 7, including the $11.25 wage and the modifications to the proposed contract that the parties had agreed upon during that session.

Notwithstanding Bell's actions of May 16, Rein and representatives of the Union held a negotiating session on May 17. Various matters, including wages, were discussed. Nothing was resolved, and the parties did not meet again until July 9. At the July 9 session a variety of issues were again considered, including wage levels. Then by letter dated July 25, Rein proposed making certain work rule changes wanted by the drivers if the Union would sign the contract that Bell had implemented on May 16. The Union refused.

The next negotiating session was held on August 20. The Union's position remained that Bell should pay at least $13.15 an hour. A deadlock resulted, and the parties agreed to seek the services of a mediator. The mediator met with the parties on September 9. While various contract provisions were discussed, the main issue was wages. At the mediator's suggestion Bell offered what it considered a major concession—$11.75 an hour (up from the $11.25 then in effect, but still down from the $12.68 that Bell had paid its drivers until May 16).

Bell's offer was unacceptable to the employees, and they went out on strike on September 18. Bell promptly withdrew its $11.75 offer. The strike lasted 4 months. Bell's employees returned to work in January 1983 under a contract providing for a wage of $11.50 an hour.

The Union Did Not Agree to the Pay Reduction

As outlined above, on May 7 Bell raised its wage offer to $11.25. Later that same day Union Business Agent Daniel Forwood met with 16 of the 19 employees in the bargaining unit. After discussing the terms of the collective-bargaining agreement proposed by Bell, including the $11.25 hourly wage, Forwood put the matter to a vote. (Forwood considered the vote an informal one. He called it a "feeler vote," that is, one designed to let him know about the feelings of the employees.) Eight employees voted in favor of accepting the contract proposal; eight voted against it. Forwood thereupon called Rein to advise Rein of the results of the vote. After Forwood told Rein of the 8-to-8 tie, the conversation proceeded as follows:

> Rein: Well, what does that mean?
>
> Forwood: Well, they [the employees] didn't reject your contract, we'd need a two-thirds vote [opposing the contract] for that.
>
> Rein: Well, then we've got a contract.
>
> Forwood: You know I have to have that approved by the Eastern Conference [of the Teamsters].
>
> Rein: Well, as long as the men didn't reject it, we have a good chance.

Forwood called Rein again on May 11, again referred to the fact that the authority to approve the contract lay with the Eastern Conference, not Local 175, and stressed that the vote on May 7 was an informal "opinion poll."

At this point, clearly, Local 175 had agreed neither to Bell's proposed contract in general nor, in particular, to the $11.25 hourly wage rate. Rather, all that had happened in response to Bell's offer was: (1) Rein was told of an evenly split opinion poll among Bell's employees; (2) the Union's officials had agreed only to have Bell's proposal considered by the Eastern Conference; and (3) Bell was told that, as it already knew, only the Eastern Conference could "approve" Bell's contract proposal.

Rein called Forwood on May 14 to say that Bell was going to implement the $11.25 wage proposal starting May 16. Forwood's response will be discussed later in this decision in connection with the question of whether the Union acquiesced in the wage cut. For now it is enough to note that Rein did not then ask Forwood to agree to the wage change, and that it is clear that Forwood did not say anything during that conversation that could be construed as the acceptance on behalf of the Union of an offer by Bell.

On May 17 Rein met with several representatives of Local 175. Rein gave them copies of the "contract" that Bell implemented as of May 16. The Union's representatives neither signed the contract nor otherwise indicated

[2] Actually Bell pays wages on a mileage basis as well as on an hourly rate. Bell proposed reductions in the mileage rates as well as in hourly rates. Hereafter this decision will refer only to hourly rates. But it should be understood that each change in proposed or actual hourly rates was accompanied by a comparable change in mileage rates.

that the Union was willing to become a party to it. Rein was again reminded of the requirement of Eastern Conference approval.

On August 12 both Bell and Local 175 received letters from the Eastern Conference advising that the Conference had "rejected the Company's proposal." Accordingly, even assuming that acceptance of Bell's proposal by the Eastern Conference could have retroactively cured Bell's implementation of the $11.25 wage rate on May 16, that did not occur.

The Union Did Not Acquiesce in the Wage Change

Rein called Local 175 Business Agent Forwood on Friday, May 14, to say that starting on May 16 Bell was going to implement the Company's $11.25 wage proposal because "we just couldn't wait any longer." Forwood responded by saying something on the order of: "Well, go ahead and see what happens. You take your best hold and we'll get ours later."

The question is whether the Union could thereby be said to have "acquiesced" in Bell's unilateral action.

Rein's statement about implementing the wage reduction came soon after a series of collective-bargaining sessions. And one issue is whether, in that circumstance, an acquiescence theory applies at all. Cases finding union acquiescence to unilateral employer action seem always to deal with situations in which the parties had not been in the midst of bargaining: See, e.g., *Merillat Industries*, 252 NLRB 784 (1980); *Austin-Berryhill, Inc.*, 246 NLRB 1139 (1979); *Citizens National Bank of Willmar*, 245 NLRB 389 (1979); *City Hospital of East Liverpool, Ohio*, 234 NLRB 58 (1978); *Clarkwood Corp.*, 233 NLRB 1172 (1977); *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975). And at least one Board case suggests that where a proposal has been the subject of bargaining, an employer may implement the proposal only upon actual agreement by the union or impasse. *Servis Equipment Co.*, 198 NLRB 266, 268 (1972).

I will nonetheless assume that under proper circumstances a union that did not agree to an employer's proposed action can be found to have acquiesced in that action even though the action had recently been the subject of negotiation. I will further assume that, since Forwood did not explicitly demand that Bell refrain from implementing the wage change, under some circumstances Local 175 could be held to have acquiesced in the change.[3]

But here: (1) Rein stated, unequivocally, that the Company was going to implement the wage reduction; (2) the Union was given very little notice—Rein told Forwood on a Friday that the change would be implemented starting Sunday;[4] (3) Rein knew that neither Forwood nor any other Local 175 official had the authority to approve a contract proposal by Bell; and (4) both Rein and Forwood contemplated that the $11.25 proposal was to be put before the Teamsters' Eastern Conference for its consideration.

Under those circumstances the only reasonable conclusion Rein could have drawn from Forwood's response was that it was simply an expression by Forwood of the realities of the situation—that the next action in the matter was the Eastern Conference's to make, that Bell was gambling that the Conference's action would be a favorable one for Bell, and that if the Conference's decision was to disapprove the $11.25 proposal, Bell would be in trouble.

That does not amount to acquiescence.[5]

Impasse

The Company implemented the $11.25 wage rate on May 16. Rein had first proposed that figure on May 7. As of May 7 Rein knew that the proposal was going to be put before the Eastern Conference for its consideration. And in Rein's own words, he believed that there was "a good chance" that the Eastern Conference would accept the Company's offer. Nothing happened between May 7 and May 16 to cause Rein to change his view. Moreover for all Rein knew, even if the Eastern Conference did not accept Bell's contract proposal, it would accompany the rejection with a counterproposal that Bell would find acceptable. Nothing about the prior negotiations suggested that they were exhaustive. And subsequent negotiations between Bell and Local 175 made it clear that Bell would have accepted a counteroffer that included a variety of changes in the terms that Bell implemented on May 16.

As it turned out, the position of Local 175 and the Eastern Conference on wage levels was firmer than Rein thought it was. In fact no agreement between Bell and the Union was possible. Because of Union Carbide's demands, Bell was clear that it had to reduce wages below its then current $12.68 level. Yet at least until sometime after September 18—when the employees went out on strike—the minimum wage the Union was willing to accept was $13.15. There was simply no way to square the Company's insistence on a wage decrease with the Union's demand for a wage increase.

The question, then, is whether the fact that the parties held irreconcilable positions at the time Bell reduced wages justifies Bell's action, even though Bell mistakenly thought that there was "a good chance" that agreement was at hand. My conclusion is that since Bell thought, at the time it acted, that an agreement might be imminent, it is irrelevant, for Section 8(a)(5) purposes, that the parties' positions were in fact irreconcilable. At bottom the demand placed on employers by Section 8(a)(5) is one of

[3] Cases such as *Austin-Berryhill*, supra, indicate that, in order to impose a duty to bargain on the employer, a union must both protest the proposed change and request bargaining. Bell and Local 175, however, already were bargaining about wage rates. Thus the latter requirement is inapplicable.

[4] *Servis Equipment Co.*, supra, held a comparable notice period to be insufficient.

[5] On June 3 the Union instituted grievance proceedings against Bell regarding the wage reduction. The General Counsel argues that that is evidence of the Union's lack of acquiescence. But acquiescence hinges on a union's response to an employer proposal prior to implemention of the proposal. Generally union action after implementation by the employer of the proposed change is irrelevant to whether the union acquiesced in the change. (The grievance ultimately was dismissed on procedural grounds.)

intent. *NLRB v. Insurance Agents (Prudential Insurance Co.)*, 361 U.S. 477, 485 (1960). Thus an employer ought to be able to act unilaterally without violating Section 8(a)(5) on the basis of its reasonable belief that negotiations are at an impasse, even though facts unavailable to the employer later show that the apparent impasse was not a real one. Similarly, where an employer that unilaterally changes terms of employment does so without any belief in the existence of an impasse, the employer's intent remains antithetical to the purposes of Section 8(a)(5) even if the employer later discovers that, fortuitously, a deadlock had existed after all. And when viewed in that manner, there was no impasse, for Section 8(a)(5) purposes, when Bell unilaterally reduced wages on May 16.

CONCLUSIONS OF LAW

1. Bell Transit Company is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act.
2. Teamsters Local Union No. 175 is a labor organization within the meaning of Section 2(5) of the Act.
3. All truckdrivers employed by Bell at the Institute, West Virginia facility of Union Carbide and Carbon Corporation, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act, constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. At all material times Local 175 has been the exclusive representative of the employees in the unit described above for purposes of collective bargaining.
5. By unilaterally reducing wage rates during negotiations and before impasse was reached, Bell engaged in a refusal to bargain in violation of Section 8(a)(5) and interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7, in violation of Section 8(a)(1).

THE REMEDY

Since Bell unilaterally reduced wages without bargaining to impasse, Bell will be ordered to make whole all affected employees by paying to them amounts equal to the difference between (1) what the employees would have earned but for Bell's violation of the Act, and (2) what they did earn at the unlawfully reduced wage rates. Bell will further be required to pay interest on such amounts[6] as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

Given the facts of this case, however, that backpay formulation raises two additional issues: (1) what is the duration of the backpay period? and (2) what should the employees have been earning at the time Bell unlawfully reduced wages?

What Wage Rate Should Bell Have Been Paying

As noted earlier, Bell was party to a collective-bargaining agreement—the National Master Freight Agreement—that expired March 31, 1982. Under the NMFA the wage rate for the period immediately prior to the contract's expiration was $12.68. Bell did pay its employees $12.68 during that period. The NMFA provided, however, that the employer parties to the agreement would pay a cost-of-living adjustment to their employees beginning on April 1, 1982 (i.e., beginning on the day after the contract expired.)[7] Under the COLA provision wages were supposed to increase to $13.15, and employers were to make comparable increases in their payments to the Teamsters' health and welfare fund and pension fund.

On March 26 Forwood and Rein agreed that while Bell would increase its fund payments in accordance with the about-to-expire contract, Bell "will continue to apply the [wage] rates currently in effect"—i.e., $12.68.[8] It was on that basis that Bell refrained from increasing its wage rate to $13.15 on April 1 and instead retained the $12.68 wage until the May 16 wage reduction. (Forwood and Rein also agreed that if negotiations between Local 175 and Bell led to a wage increase, Bell would make the increase retroactive to April 1, 1982. That aspect of the agreement, of course, became moot.)

Rein had previously been told that, in the upcoming negotiations, new contract terms could be approved only by the Eastern Conference and not by anyone in Local 175. Moreover the union signatory to the NMFA was the Teamsters National Freight Industry Negotiating Committee, not Local 175. Arguably, therefore, Forwood had no authority to enter into any agreement of that kind, and Rein should have known that. That, in turn, suggests that Bell should have increased its wage rate to $13.15 an hour on April 1, and backpay should be based on the difference between $11.25 and $13.15, rather than between $11.25 and $12.68.

But my recommendation is that backpay be based on the $12.68 rate. For one thing, neither the charge nor the complaint alleges that Bell did anything wrong by continuing the $12.68 rate after March 31. For another, the March 26 agreement became effective on April 1, which was after Bell's bargaining relationship with the Teamsters National Freight Industry Negotiating Committee ended. Thirdly, Forwood said nothing to Rein to indicate that he could not bind the Union to an interim agreement of the kind that Rein and Forwood purportedly entered into on March 26. And finally, Rein sent the Eastern Conference a copy of his letter confirming the agreement. He received no response from the Eastern Conference. Under the circumstances Rein could have reasonably concluded that while the Eastern Conference had to approve final agreements, the Local could, on its own, enter into interim agreements of the kind he negotiated with Forwood.

[6] See *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[7] It is not unusual for collective-bargaining agreements to provide that employers will make COLAs after the expiration date of the contract. See *Meilman Food Industries*, 234 NLRB 698 (1978). The failure of an employer to abide by such a provision may amount to a violation of Section 8(a)(5). Id.

[8] Rein letter to Forwood of March 26, 1982.

Duration of the Backpay Period

The backpay period began on May 16, 1982, the date Bell implemented the wage rate reduction. That much is clear.

It is also clear that the backpay period ended no later than September 18, 1982. On September 9 Bell offered $11.75, a figure that was as high as Rein felt Bell could possibly go. The Union's leadership, still claiming that Bell should pay at least $13.15, put the matter to a vote of the employees—strike, or accept Bell's offer. On September 18 the employees voted 14 to 5 in favor of a strike. The strike began that day. It ended 4 months later when the employees returned to work under an agreement providing for a wage rate of $11.50.

The more difficult question issue is whether the backpay period should be deemed to have ended sometime prior to September 18. As may be recalled: (1) Bell had but one customer, Union Carbide; (2) that corporation had demanded that Bell promptly reduce the $12.68 wage rate that Bell had been paying its drivers (for which wages Union Carbide reimbursed Bell), so that Bell was under considerable pressure to reduce its wage levels; and (3) the Union, at all times from the start of bargaining on into the strike, was insistent on a wage well above anything Bell believed that it could afford. Given those facts, had Bell not reduced wages on May 16 further bargaining would likely have led to impasse well before September 18. Thus it might well be that requiring Bell to pay backpay for the period May 16 to September 18 would be giving Bell's employees a windfall rather than simply restoring to them the amounts they would have received but for Bell's violation of the Act.

One possibility, under these circumstances, would be to require Bell and Local 175 to bargain about the backpay amounts. See *Atlantic International Corp.*, 246 NLRB 291, 292 (1979), enfd. 664 F.2d 1231 (4th Cir. 1981). But it is hard to see how that would resolve anything. My recommendation, instead, is that the question of what date Bell and the Union would have reached impasse (had Bell not acted unilaterally) be resolved in a compliance proceeding. See *Wellman Industries*, 222 NLRB 204, 208 (1976).

[Recommended Order omitted from publication.]